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FOR DISCUSSION PURPOSES ONLY

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Acton Conservation Commission Guidance 2015-
Approved on _____

**GUIDANCE FOR IMPLEMENTING THE TERMS “like...activities” AND “like structures”
IN THE ACTON WETLAND BYLAW**

INTRODUCTION

Section F8.3 of the Acton Wetlands Bylaw sets forth minimum distances (setbacks) from the edge of wetlands or vernal pools for activities regulated by the By-law. This section also includes an exception to the minimum setbacks:

“Pre-existing activities or structures not meeting the setbacks set forth above need not be discontinued or removed [but shall be deemed to be non-conforming]. No new activity shall be commenced and no new structure shall be located closer to the edge of wetlands or vernal pools than existing non-conforming LIKE ACTIVITIES OR STRUCTURES, but the Commission may permit new activity or structures as close to the edge of wetlands or vernal pools if it finds that such activity or structure will not affect the interests protected by the Bylaw more adversely than the existing activity or structure.”
(emphasis added)

The Bylaw does not include definitions of “like activities” or “like structures”. However, the Rules and Regulations issued by the Commission under the Bylaw contain the following definitions and section:

“LIKE ACTIVITY shall mean any activity similar in nature, purpose and extent as that activity currently occurring on the site of the proposed work”.

“LIKE STRUCTURE shall mean any structure similar in design or use currently located on the site of the proposed work”.

Section 3.3 WETLAND SETBACKS FOR EXISTING STRUCTURES

*Work associated with pre-existing structures or activities not presently in compliance with Section 3.2 [the setback requirements] may not increase the degree of “non-conformance” of those structures or activities. No new activity shall be commenced and no new structure shall be located closer to the edge of a Wetlands Resource Area than existing non-conforming like Activities or structures, but the Commission may permit new like Activity or structures as close to the Wetland Resource Area as the existing like **(SEE NOTE 1)** Activity or structure if it finds such Activity or structure will not affect the interests provided for in the Bylaw more adversely than the existing Activity of structure.*

The Commission has interpreted these provisions to mean that when there are existing non-conforming activities or structures within the minimum setbacks, such activities and structures MAY be expanded or replaced with like activities or structures IF such expansion or replacement is no closer to the wetland or vernal pool AND does not increase any existing adverse affects on the wetland or vernal pool.

There has been confusion as to how the terms “like activities” and “like structure” are implemented by the Commission. The purpose of this document is to provide guidance to potential applicants under the Wetlands Bylaw as to how the Commission interprets these terms.

GUIDANCE

In general, the Commission believes that the exception to setbacks for pre-existing activities and structures is a modest one and meant to be used sparingly. It is intended to allow limited expansion or replacement of existing non-conforming structures and activities in very limited circumstances when there is no (feasible? **SEE NOTE 2**) alternative.

The following examples illustrate the Commission’s interpretation of “like structure” and “like activities”:

1. There is a pre-existing (**SEE NOTE 3**) house within the 75’ setback. The Commission will not permit an addition to that house unless the Commission finds that the addition is no closer to the wetland or vernal pool than the pre-existing house and provided that there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing house and there is no (feasible) alternative.

ALTERNATIVE WORDING: There is a pre-existing house within the 75’ setback. The Commission MAY permit an addition to that house provided the Commission finds that the addition is no closer to the wetland or vernal pool than the pre-existing house, there is no increase in any existing adverse impact on the resource area due to the pre-existing house, and there is no (feasible) alternative.

{Note to reviewers: We can put these examples in the positive (The Commission MAY permit...provided that...) or in the negative (The Commission will not permit ...unless...). This discussion draft uses the negative, but it can be easily changed. The “may” language may give more flexibility to the Commission, since it implies that even if there are no adverse impacts or alternatives, approval is still a “may”. On the other hand, the “will not permit” language implies that if there are no adverse impacts of alternatives, then a permit will be granted. }

2. There is a pre-existing driveway within the 75’ setback. The Commission will not permit an extension of the driveway unless the extension is no closer to the wetland or vernal pool, there is no increase in any existing adverse impact on the resource area due to the pre-existing driveway, and there is no (feasible) alternative.

3. There are a pre-existing office building and parking lot within the 75' setback. The office building is 55' from the wetland resource area and the parking lot is 40'.

Option 1 for consideration: The Commission will not permit an expansion of the building unless the expansion is no closer to the wetland or vernal pool than the pre-existing building and will not permit an expansion of the pre-existing parking lot unless the expansion is no closer to the wetland or vernal pool than the pre-existing parking area, there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing building and parking lot, and there is no (feasible) alternative. (NOTE: In this option, the existing building and parking lot are treated independently as separate structures; therefore, their respective setbacks are independent. In this example, the pre-existing building is 55' from the resource area and the pre-existing parking lot is 40' from the resource area, so the building expansion can be no closer than 55' from the resource area.)

Option 2 for consideration: In Option 2, the pre-existing building and pre-existing parking lot are considered together, so that no expansion of either can be closer to the resource area than the closest one. This would mean that the pre-existing building could be expanded up to 40' from the resource area.

4. There are two pre-existing buildings on one lot: Building A is 60' from a resource area; Building B is 40'. Even though Building B is closer to the resource area than Building A, the Commission will not permit an expansion to Building A that is closer than 60' from the resource area unless there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing Building A and there is no (feasible) alternative. **(SEE NOTE 4)**

5. There is a pre-existing above-ground swimming pool within the 75' setback. The Commission will not permit the above-ground pool to be replaced by an in-ground pool unless the in-ground pool is no closer to the wetland or vernal pool, there is no increase in any existing adverse impact on the resource area than may already exist due to the pre-existing above-ground pool, and there is no (feasible) alternative. **(SEE NOTE 5)**

6. There is a pre-existing driveway within the 75' setback. The Commission will not permit a garage where the driveway is because a garage is not similar in design or use to a driveway. **(SEE NOTE 6)**

7. There is a pre-existing child's play area (sand box and/or play gym) within the 75' setback. The Commission will not permit that play area to be replaced by an in-ground swimming pool because an in-ground swimming pool is not similar in design or use to a play area.

8. There are a pre-existing house and detached garage on a property. The pre-existing house is 40' from a wetland; the garage is 30'. Because the house and garage are considered to be similar in use, i.e., both are part of a residential use, the Commission may

permit an addition to the house, up to 30' from the wetland, provided there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing house and garage and there is no (feasible) alternative.

THESE NOTES ARE FOR DISCUSSION ONLY.

NOTE 1: In a recent case before the Commission, a difference in wording between the By-law and the regulations was pointed out by the applicant's attorney. Specifically, the By-law says in Section F 8.3 that the Commission may permit "new activity or structures" and the regulations say in Section 3.3 that the Commission may "permit new like activity or structures". Although the By-law language is confusing, a possible explanation is that the context of the By-law clearly implies that it is referring to like activity and structures and that the regulation merely provides clarity. If the Commission agrees, there should be a note to that effect in this policy.

NOTE 2: "Feasible" can mean physically or financially possible. Do we want to use the term, and if so, what do we want it to mean.

NOTE 3: It seems implicit that the term "pre-existing" in the by-law means in existence prior to the date the by-law was enacted, April, 2003. Do we want to make that clear in this guidance?

NOTE 4: The definitions of "like activity" and "like structure" include the phrase "on the site of the proposed work". What is the "site"? Is it the entire lot where the work is proposed or is it just the actual location of the work on the lot?

The By-law does not include the term "site" in the discussion of pre-existing activities and structures in Section F 8.3. However, the term "site" is used in at least two places in the regulations: in the definitions of "like activity" and "like structure" and in Section 3.6, Storage of Fill. However the Commission decides to interpret the term "site", the interpretation need to be used consistently.

NOTE 5: Since the definition of "like activity" includes activities similar in nature, purpose, and intent and the definition of "like structure" means similar in design or use, it would seem that an in-ground pool is similar to an above ground pool. However, one is permanent and includes an in-ground foundation, and the other does not. Does that make difference in the context of the definitions?

NOTE 6: While a driveway is not similar to a garage with respect to structure, it is similar to one with respect to use. However, does the fact that most garages are also used for at least some storage, or may be converted to a shop or even living space sometime in the future, mean that the Commission should not consider them to be similar in use?

This Guidance Document is not intended to and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in any litigation with the Acton Conservation Commission. Nothing in this Guidance Document limits the Commission's authority in approving or disapproving any Request for Determination of Applicability or Notice of Intent submitted pursuant to the Acton Wetland Bylaw or in determining compliance with the Bylaw. The Commission reserves the right to act at variance with this Guidance Document and to change it at any time without public notice.

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